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IN THE

Supreme Court of the United States

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No. 72-564

October Term, 1972

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1, CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

against

CHARLES JAMES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *AMICUS CURIAE*

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Statement

This Brief *Amicus Curiae* is submitted by Ewald B. Nyquist, as Commissioner of Education of the State of New York, President of the University of the State of

New York, and Chief Executive Officer of the New York State Board of Regents, with the consent of all parties to this litigation (letters of consent* are attached hereto as Appendices A and B).

Respondent Charles James, a teacher of English in the Addison Central High School, was dismissed by petitioner Board of Education on January 13, 1970.

At that point James had a choice of instituting an action in the Federal Courts, or an action or proceeding in the State Courts, or an appeal to the Commissioner of Education of the State of New York who, under New York State law, has judicial powers over the State school system (the procedure on such appeals is described under "Interest of the *Amicus Curiae*", *infra*).

Respondent selected the appeal to the Commissioner of Education as his remedy.

The decision on that appeal was rendered on September 23, 1970. The appeal was dismissed in a lengthy decision, a copy of which is attached hereto as Appendix 2.

At this point respondent again had a choice of three remedies. He could either have petitioned the Commissioner of Education for a re-opening of the decision or he could have sought a review of the decision in the Federal Courts or he could have sought a review of the decision in the State Courts.

Instead of seeking a *review of the decision* in the Federal or State Courts, which he had every right to do, respondent chose to wholly ignore the decision of the forum of his own choice and proceeded *de novo*, by instituting the present action in the United States District Court for the Western

* The originals are on file with the Clerk of the Court.

District of New York. The Commissioner of Education was not named as a party defendant and did not intervene as such.

The complaint was dismissed on December 22, 1971 by Judge BURKE who held that since James did not appeal the decision of the Commissioner, the questions raised had became *res judicata*. Judge BURKE also held that appellee's actions were not constitutionally protected. On appeal to the United States Court of Appeals for the Second Circuit, Judge BURKE's order and judgment was reversed on May 24, 1972 in a unanimous opinion by Judge KAUFMAN. The Court wholly misapprehended the holding of the District Court and the position of the petitioners and *Amicus* as being to the effect that respondent should have exhausted *State* judicial remedies. Neither the District Court nor petitioners nor *Amicus* held or hold such an untenable view. The point is that respondent *should have appealed* the decision of the Commissioner *to the Federal Court*. He could, of course, also have used the lengthier State Court route by asking a State Court to review the decision. But the decision of Judge BURKE was based on lack of appeal to *any Court*.

The Circuit Court opinion was also based on the wholly unsupported and unsupportable assumption of the Court that the Board of Education's action was based on "prejudices of the community" and "because [the Board of Education] do not agree with the teacher's political philosophies and leanings". There is not one scintilla of evidence in the record before the Commissioner to that effect. Indeed, it was exactly the fact of divergent views in the community that underscored the educational policy that teachers must present all points of view.

Petitioners thereafter petitioned for a rehearing, suggesting a rehearing *en banc*. This petition was denied on July 12, 1972, *with Judges Hays and Mulligan dissenting.* A letter on behalf of *Amicus*, supporting the petition for rehearing, is attached hereto as Appendix 3. The order of Chief Judge FRIENDLY, denying said petition for a rehearing, is attached hereto as Appendix 4.

The petition for certiorari is clearly supported by Rule 19 of the Rules of this Court, in that the decision has, procedurally, "so far departed from the accepted and usual course of judicial proceedings. . . .as to call for an exercise of this Court's power of supervision". In addition, even though the merits of the controversy cannot be reached for adjudication, the Court below "has decided a federal question in a way in conflict with applicable decisions of this court".

Interest of the *Amicus Curiae*

The Commissioner of Education of the State of New York, who is a constitutional officer (New York State Constitution, Article V, section 4), has judicial powers over the State education system by virtue of the provisions of New York State Education Law section 310—312, which read as follows:

> "§ 310. Appeals or petitions to commissioner of education and other proceedings. Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

"§ 311. Powers of commissioner upon appeals or petitions, *et cetera*. The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribe conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision."

"§ 312. Filed papers and copies thereof. The commissioner shall file, arrange in the order of time, and keep in his office, so that they may be at all times accessible, all the proceedings on every appeal or petition to him under this article, including his decision and orders founded thereon; and copies of all such papers and proceedings, authenticated by him under his seal of office, shall be evidence equally with the orginals."

The Rules of Practice before the Commissioner are contained in Handbook 1, and a copy thereof is attached hereto as Appendix 1.

This *judicial* power, thus designated by Education Law section 207 (referring to "the judicial functions of the commissioner of education") has been vested in the Commissioner and his predecessors since *1822*.

His judicial decisions have been reported, for the years 1913 to 1958 in the New York "State Department Reports",* Volumes 1 through 78, and since 1958 in the "Education Department Reports", copies of which latter series (of presently nine volumes) are contained in the United States Supreme Court Library.

This judicial function is largely appellate in nature in that it involves appeals to the Commissioner from determinations of subordinate bodies or officers in the State school system. The procedure is largely the same as in motion practice in the State Courts, in that an "appeal" is initiated by a petition which must be verified, served on all respondents and generally filed within 30 days from the determination complained of. The answer must be verified,

* Published by the Secretary of State.

served on all petitioners and filed within 20 days from service of the petition. The reply, if any, must be served and filed within 10 days thereafter. No "hearings" are held, *i.e.*, all factual matters must be presented by affidavit (see *Matter of O'Brien*, 76 State Dept. Rep. 136; 3 AD 2d 321; 3 NY 2d 881; *4 NY 2d 140;* 6 AD 2d 140; 5 NY 2d 709; 6 NY 2d 882; *sub nom. Murphy* v. *Commissioner of Education*, 361 U.S. 117). Briefs and memoranda of law are served and filed, and generally oral argument is held before the Commissioner and his Counsel (see Rules, section 276.2).

Relevant here also are the provisions of Education Law sections 306, 1706 and 2559, which read as follows:

> "§ 306. Removal of school officers; withholding public money.
>
> 1. Whenever it shall be proved to his satisfaction that any trustee, member of a board of education, clerk, collector, treasurer, district superintendent, superintendent of schools or other school officer is a member of an organization listed as subversive by the board of regents pursuant to the provisions of section three thousand twenty-two of this chapter, or has been guilty of any wilful violation or neglect of duty under this chapter, or any other act pertaining to common schools or other educational institution participating in state funds, or wilfully disobeying any decision, order, rule or regulation of the regents or of the commissioner of education, said commissioner, after a hearing at which the school officer shall have the right of representation by counsel, may, by an order under his hand and seal, which order shall be recorded in his office, remove such school officer from his office.
>
> 2. Said commissioner of education may also withhold from any district or city its share of the public money of the state for wilfully disobeying any provision of law or any decision, order or regulation as aforesaid."

"§ 1706. Power of removal or member of board of education. For cause shown, and after giving notice of the charge and opportunity of defense, the commissioner of education may remove any member of a board of education. Wilful disobedience of any lawful requirement of the commissioner of education, or a want of due diligence in obeying such requirement or wilful violation or neglect of duty is cause for removal."

"§ 2559. Power of removal of member of board of education. For cause shown, and after giving notice of the charge and opportunity of defense, the commissioner of education may remove any member of a board of education. Wilful disobedience of any lawful requirement of the commissioner of education, or a want of due diligence in obeying such requirement or wilful violation or neglect of duty, is cause for removal."

It will be noted that wilful disobedience of a judicial decision of the Commissioner of Education by a board of education is cause for removal from office (see *McGraw* v. *Wilson*, 75 State Dept. Rep. 11, 44; 286 App. Div. 930, 977).

While section 310, as indicated, prohibits State Court review in clear terms, the New York Courts have accepted a limited review of Commissioners' judicial decisions (see *Board of Education* v. *Allen*, 6 NY 2d 127; *Matter of Vetere* v. *Allen*, 15 NY 2d 259; *Matter of Ocean-Hill Brownsville* v. *Board of Education*, 23 NY 2d 483; on the impropriety of collateral attacks on judicial decisions of the Commissioner, see also *Chapin* v. *Board of Education*, 291 N. Y. 241).

We are not aware of any similar limitation on review of judicial decisions of the Commissioner of Education in the Federal Courts* and consequently there was and is no rea-

* *Taylor* v. *New York City Transit Authority*, 309 F. Supp. 785, aff. 433 F. 2d 665, was referred to in the opinion of the Court below, but present petitioner's reliance on that decision was wholly misunderstood by the Court. Taylor litigated his case before the administrative

(Footnote continued on following page)

son whatsoever why respondent in the cause at bar could not have sought review of this decision of the Commissioner (which will be reported as *Matter of James,* 10 Ed. Dept. Rep. 58), in the United States District Court for the Western District of New York.

This, however, he did not do. He ignored the decision of the forum of his choice and proceeded de novo.

1. This then poses a very difficult procedural problem. The Circuit Court has reversed the decision of the Commissioner in this action to which the Commissioner *is not a party.* That judgment is, therefore, void. The Commissioner is, hence, not bound by that decision, nor presumably is the Board of Education. If the Board of Education, however, disobeys the decision of the Commissioner of Education, removal of the Board could be sought by any qualified voter in the district "conceiving himself aggrieved". It is essential that the Commissioner not be placed in such a dilemma. The decision of the Circuit Court must be reversed for lack of jurisdiction over the person of the Commissioner of Education.

2. While the merits of this controversy cannot be reached, *Amicus,* nevertheless, wishes to emphasize his concern and disagreement with the Circuit Court's opinion, as Chief

(Footnote continued from preceding page)
agency and sought review of its decision in the State Courts. Instead of appealing the decision of the New York State Court of Appeals to the United States Supreme Court, however, he proceeded *de novo* in the United States District Court. While Judge WEINSTEIN did not wish to rely on *res judicata,* the Circuit Court stated clearly that *res judicata* applied. In so doing, the Circuit Court relied, in part, on *Board of Education* v. *Allen,* 6 NY 2d 127 (dealing with the judicial power of the Commissioner of Education and its statutory finality) as an illustration. Judge WEINSTEIN, in the District Court opinion, quoted New York State Education Law § 310 (judicial power of the Commissioner of Education) as being reviewable in the Federal Courts.

State School Officer of the State of New York. The following is, therefore, brought to the attention of the Court in the interest of the New York State Education system.

The Circuit Court opinion here rests on two basic theories:

a. That only physical disruption, threats of violence or protest by students, teachers or parents can be a sufficient basis for Board of Education action;

b. That the influence of this teacher's action on any student is not documented or proven in this litigation and must, therefore, be disregarded.

Both of these theories, however, do violence to the education process, the protection of which is the State constitutional and statutory function of *Amicus*.

It is absolutely essential that the impressionable young minds of the students be safeguarded against partisan indoctrination of any kind by individual teachers' personal leanings and views, especially where an individual purports to promote his views on a subject other than that in which the teacher has certificated professional competence and expertise. Where any kind of controversial issue is concerned, there are three basic requirements which the school system must meet:

(1) The student must be instructed by the expert assigned to the duty of teaching the subject of which the controversial question is a part. This will insure that the question and all related matters will be taught effectively and as completely as possible.

(2) The student must be given *all* pertinent information related to the subject, not just the personal views of an individual teacher. On the question here involved, for

instance, the war in Vietnam, the student must be given the position of the United States Government as well as that of opponents of that position, and in addition, must be given an overview of all the many and varied positions on the matter which are being espoused by various groups.

(3) The student must be given an opportunity, within the context of the two preceding requirements, to ask questions and discuss and debate the matter to the extent that time and the maturity level of the student will permit.

These three requirements are of the utmost importance because the student is taught to look up to and emulate the teacher and the influence of a teacher on an individual student will rarely be capable of being documented in any specific litigation. The result of such influence indeed may not surface for years. Such influence, further, may or may not cause serious problems when opposed to parental teachings.

The often quoted phrase that "the school is the marketplace of ideas" is both overboard and inapplicable to the elementary and secondary school system, except within well defined boundaries. A third grade mathematics class, for instance, is not the place for discussing foreign or domestic public policy or other matters not pertinent to the teaching of mathematics to students of that specific age and maturity level.

When the subject matter of modern foreign policy has been reached in a social studies class, then, and only then does that specific class become "the marketplace of ideas" on that specific subject, guided by a teacher whose function and duty it is to set forth the whole range of facts, theories and views on the subject. The individual views of

students must be f ed on the basis of full exposure to all known present ' thought on any given subject and it is the solemn duty the school system to make sure that the student receives ..ch full and unbiased exposure. The Board of Education, therefore, has the duty to protect the processes necessary to achieve this end and the decision of *Amicus* was based on that requirement. The opinion of the Circuit Court wholly fails to come to grips with the real issues here involved.

As indicated, however, the merits of this controversy cannot be reached on this record. Since the Circuit Court, however, has gone into these matters, *Amicus* wishes to record his views on the subject.

Questions Presented for Review

A PROCEDURE

1. Is it not axiomatic that a Court can impose judgment only on persons or officers who are parties to the litigation; and consequently, is not the judgment below void, since the Court did not acquire *jurisdiction over the person* of the Commissioner of Education who was neither named as a party nor intervened in this litigation?

2. Is it not axiomatic that respondent could have sought to *review the decision* of the Commissioner *in the Federal Courts* (or in the State Courts), but that he cannot ignore a judicial decision of the forum of his own choice, and that he cannot proceed *de novo*, ignoring his own choice of remedy?

3. Was the District Court not correct in holding the decision of the Commissioner to be *res judicata*, where respondent did not seek to review the decision in the United States District Court, but attempted to proceed *de novo*, in a collateral attack and without making the Commissioner a party defendant?

4. Was the Circuit Court not in error when it imputed to the District Court and to the petitioner and *amicus* the contention—which was never made nor even implied—that respondent had to "exhaust State judicial remedies"?

5. Was the District Court not correct when it stated: "The plaintiff did not appeal, as he had the right to do, but instead brought this action"?

6. Was it not error for the Circuit Court to condemn the proceedings before the Commissioner by characterizing the oral argument before him as "no more than an informal round-table discussion", "an informal discussion", "without a transcript being made", without having personal jurisdiction over the Commissioner and absent a proceeding to review the decision, in which review such matters could be pleaded and briefed?

B

MERITS

If the merits of this controversy could be reached for adjudication—which we urgently submit is impossible on this record—the following additional questions would be presented for review:

7. Was it not error for the Circuit Court to hold that only "breaches of discipline", "material and substantial disruption", "threatened disruption" or "protest from students, teachers or parents" would justify a board of education in taking action to protect the integrity of the educational process?

8. Was it not error for the Circuit Court to *say* that "material and substantial jeopardy to sound education" is a proper basis for board action, and that "we disclaim

any intent to condone partisan political actions in the public schools which reasonably may be expected to interfere with the educational process", and at the same time to *render judgment* to the contrary?

9. Was it not error for the Circuit Court to hold that: "Clearly, there was no attempt by James to proselytize his students" when obviously the wearing of the armband *in class*, and relating to a subject wholly divorced from his own teaching function, could have had no other conceivable purpose?

10. Was it not error for the Circuit Court to hold that the board of eduation was "arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings" *when the record contains not even a scintilla of evidence to that effect* and when, on the contrary, the board and the administration and the community, as brought out at oral argument before the Commissioner, was so deeply divided on this issue that strict neutrality on the part of the teaching staff was considered to be essential and imperative in the very interests of sound education, so as to offer the students the full range of thought on this controversial subject, and only within the subject area of instruction concerned with this subject?

11. Was it not error for the Circuit Court to ignore the Joint Code of Ethics, jointly adopted after much study by the New York State School Boards Association and the New York State Teachers Association which requires such neutrality exactly for the purpose of avoiding the evils so eloquently portrayed by the Circuit Court, of "allowing teachers to patrol the precincts of radical thoughts with the unrelenting goal of indoctrination, a goal compatible with totalitarianism and not democracy"?

12. Was it not error for the Circuit Court to hold that "as far as we know [James' action] did not have any influence on any students" when the effect of political partisanship on the part of teachers obviously cannot be measured in terms of Court proceedings, but may have the most far reaching effects into the future development of individual pupils, because students are taught to look up to and emulate teachers?

13. Is not the existence of a substantial federal question here in any event clearly foreclosed by previous decisions of this Court?

ARGUMENT

POINT I

The judgment below is void for lack of jurisdiction over the person of the Commissioner of Education.

Respondent had the unquestioned right to challenge the legality of his dismissal either in the Federal Courts, or in the State Courts, or by an appeal to the Commissioner of Education under § 310 of the New York Education Law.

He voluntarily selected the remedy of an appeal to the Commissioner.

Not being satisfied with the decision of the Commissioner, *he again had a choice of three remedies.* He could have petitioned for a re-opening of the decision of the Commissioner. Or he could have brought a proceeding under Article 78 of the New York CPLR for a review of the decision, in the State Courts. Or, finally, he could have brought an action in the appropriate United States District Court against the Commissioner of Education, seeking a review of his decision. In case of both of the latter avenues of review, the Commissioner would have been

named as a party defendant or party respondent, so that the Court would have acquired jurisdiction *in personam* against the Commissioner, and thus the decision of the Court would have been binding on the Commissioner.

Here, however, ~~appellee~~ respondent did not seek to review the decision reached in the forum of his own choice. Rather he chose to wholly ignore that forum and decision, and proceeded *de novo*. The result is that the Commissioner is not a party to this litigation; *that the record before the Commissioner, on the basis of which he rendered his decision, is not before the Court;* that the procedure on appeals before the Commissioner was not known to the Court except through casual remarks made apparently at oral argument and reflected in some basic but erroneous assumptions woven into the decision—and which are wide of the mark; that judgment was pronounced against an officer who is not a party to this litigation and over whom the Court axiomatically has no jurisdiction; and in sum, that the judgment is void and necessarily a nullity.

> "Judge LEARNED HAND clearly set forth the limitations on the power of a Court in *Alemite Manufacturing Corp.* v. *Staff*, 2 Cir., 1939, 42 F. 2d 832, when he stated that:
>
> > "* * * no court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; *its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.* * * *" (Emphasis added.)
>
> We think what Judge HAND said in that opinion clearly governs the situation before the court."
>
> *McCracken* v. *Pennsylvania Railroad*, 135 F. Supp. 660.

> "It would seem elementary that if the court has no jurisdiction over a defendant, the defendant has an unqualified right to have an order entered granting its motion to dismiss."

Read v. *Ulmer*, 308 F. 2d 915, 917 and cases cited there.

This rule of law is so basic that we do not wish to waste the time of the Court with a lengthy recital of decisions.

Three items in the Circuit Court's opinion illustrate the impropriety of the procedures here used:

1. a. The characterization of the oral argument before the Commissioner as "no more than an informal round-table discussion".

The Commissioner not being a party, could not be heard and did not have his day in Court. He had no opportunity to be heard, to plead, to brief any of the matters brought before the Court. Apart from the fact that Commissioners of Education have traditionally given Counsel the choice of presenting their oral argument either while standing or while sitting, the oral argument before the Commissioner is in no way different from oral argument before any other tribunal.

b. In erroneously seeking to distinguish *Taylor* (309 F. Supp. 785; aff. 433 F. 2d 665), the Circuit Court stated:

> "Since no transcript of the proceedings before Commissioner Nyquist was made, James cannot be charged with the failure to raise any of his claims. Suffice it to say that appellees conceded at oral argument that the broad range of James's grievances were discussed informally before the Commissioner."

As shown above under the heading: "Interest of the *Amicus Curiae*", the procedure before the Commissioner involves a full set of pleadings, memoranda of law, affidavits and all papers required in any judicial tribunal, as well as an oral argument such as is had in any Court.

The Circuit Court, of course, did not have before it the record on which the Commissioner's decision was based, the Commissioner not being a party to this litigation.

Instead of concluding—without any discernible basis whatever—that there was no record, the Court should have affirmed the decision of the District Court, the decision of the Commissioner having become *res judicata*, through respondent's own choice.

2. Respondent's ~~Appellee's~~ allegation that another teacher displayed the slogan "Peace with Honor" on his blackboard, which is made "on information and belief" and as to which ~~petitioner~~ ~~appellant~~ denies knowledge and information sufficient to form a belief, was used by the Circuit Court as a basis for its decision. Yet, there is no basis alleged by ~~appellee~~ respondent on which he could conclude (a) that it was the teacher who wrote the phrase on the blackboard; (b) that the teacher in fact knew that the writing was there; (c) that the writing was not written, if it was indeed written by the teacher, as a part of a social studies teacher's full explanation of opposing views on this matter; (d) that the teacher was not told to remove it and did so; (e) that the writing was the second time that the teacher wrote it (if indeed he did at all) and still was not disciplined—it will be noted that James was not dismissed for the first wearing of the armband, but only after the second time which second time was after instructions not to do so.

The salient point here is that the record before the Commissioner does not contain any such allegation. Had it done so, the ~~appellant~~ petitioner would have had an opportunity to ascertain the facts involved (the answer of ~~appellant~~ petitioner in the appeal before the Commissioner was verified just about one month after the respondent's dismissal. The allegation in question was not made until *one year and four*

months after the event alleged. Such a time lapse prejudices petitioners severely.

3. Before the Commissioner respondent alleged that he wore the armband as "a symbol of an opinion" which "was intended to convey to all who cared to observe the opinion and association of the petitioner with respect to the acts of the administration of the Government of the United States and its conduct of the war in Vietnam" (Paragraph 12 of Reply of Charles James, verified February 19, 1970 by Jeremiah S. Gutman, Esq., one of the Attorneys for Petitioner, who stated in said verification that "the grounds of deponent's belief as to all matters in the said Reply not stated upon his own knowledge are investigations which deponent has caused to be made concerning the subject matter of this Reply and information acquired by deponent in the course of his duties from the books and papers of said petitioner").

The complaint in the present action, however, on the contrary, now claims that James wore the armband "to express his deep religious conviction as a practicing Quaker", etc. The complaint is dated April 8, 1971—more than a year later—and is submitted by the same Jeremiah S. Gutman, Esq. (and other attorneys).

While this new allegation leaves the impression of an afterthought, it nevertheless points up the vice of the improper procedural route used by respondent.

It is apodictic, of course, that a teacher's religious convictions can give him no more "right" to attempt to indoctrinate his captive audience of students—especially where the manner of presentation eliminates all possibility of discussion, inquiry and debate—thus effectively eliminating the essentials of the basic learning process.

It is illuminating in this context, that the Court below stated in footnote 9: "In this posture of the proceedings, we must accept all factual allegations in the complaint as true".

We submit that this alone proves conclusively that the judgment below must be reversed.

POINT II

The decision of the Commissioner of Education is *res judicata*.

Respondent had the unquestioned right to appeal from the decision of *Amicus* to the appropriate Federal or State Court.

Instead of exercising that right, he brought the present action, ignoring the forum of his own choice.

In the appeal before the Commissioner, respondent was the petitioner and petitioner board of education was the respondent.

In the present action respondent again is the plaintiff and petitioner board again is the defendant.*

Both causes involve the identical parties and the identical set of facts.**

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* The present action also names the District Principal, the High School Principal and the President of the Board of Education as defendants. This, however, is immaterial since the decision of which respondent complains was made by the Board of Education and, under state law, could only be made by said Board of Education.

** Before the Commissioner, respondent claimed to base his position on seemingly purely political reasons. In the present action he claims purely religious motives (Complaint, paragraphs 4 and 5). The actual facts, however, are entirely identical. As far as the constitutional issues are concerned, it is immaterial whether a teacher attempts to indoctrinate his captive audience in foreign policy or in religion. There is, we submit, no constitutional protection for either course of conduct.

As this Court pointed out in *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, the conclusions of an appropriate forum "are not assailable collaterally except for fraud or lack of jurisdiction". There is no question of fraud involved here; and the jurisdiction of the Commissioner of Education is clearly and properly grounded in state law (in the latter connection, see *Bullock* v. *Cooley*, 225 N. Y. 566 and *Matter of Kabatt*, 52 State Dept. Rep. 59; 246 App. Div. 886; app. dism. 271 N. Y. 629; rearg. den. 272 N. Y. 508; cert. den. 300 U. S. 65; rehearing den. 300 U. S. 687).

Hence the doctrine of res judicata clearly applies.

As Chief Justice WARREN pointed out in *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322;

> ". . . [Under] the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties bars a second suit based on the same cause of action".

In *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, this Court stated:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appeals, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

To the same effect:

Marshall v. *Holmes*, 141 U. S. 589, 596;
American Surety Co. v. *Baldwin*, 287 U. S. 156;
Davis v. *Davis*, 305 U. S. 32;
Stoll v. *Gottlieb*, 308 U. S. 165;

Taylor v. *New York City Transit Authority*, 433 F. 2d 665 (2nd Circuit);

Lackawanna Police Benevolent Association v. *Balen*, 446 F. 2d 52 (2nd Circuit) ("no second bite at the cherry");

Howe v. *Brouse*, 422 F. 2d 347 (8th Circuit);

Scott v. *California Supreme Court*, 426 F. 2d 300 (9th Circuit).

It is submitted that the judgment below must be reversed.

POINT III

The judgment below fails to recognize the need of the educational processes to be protected from any partisan political or religious indoctrination.

As indicated above, the merits of the present controversy cannot, on this record, be reached.

Since the opinion of the Court below, however, if not reversed, would open the door to political and religious indoctrination of students by teachers forcing their own personal views, out of context, on the captive audience entrusted to them, it is important that *Amicus* present this aspect of the educational process which the Court below completely failed to understand and consider.

It is one of the most basic principles of all education that the student must be exposed to all existing knowledge on a given subject and in case of controversial subjects, to all the pertinent views taken on the subject by all concerned groups.

It so happens that the present controversy deals with the war in Southeast Asia. The concern of *Amicus*, however, is much broader than that subject. There are a great many

controversies in a great many subjects that from time to time forcefully occupy the minds of large segments of our society and which must be appropriately dealt with in the classroom.

The principle here at stake covers *all such subjects*, and thus the entire process of education. It is vital, therefore, not to limit the consideration of the issues to the specific subject matter here involved.

We would point specifically to the sixth paragraph of the Affidavit of Edwin J. Brown* (one of the nominal petitioners), which reads as follows:

> "6. I assured him that I recognized his right to hold any political views and to participate in political activities when not on duty as a teacher in the school. I felt that his wearing an arm band while on duty as a teacher was not proper. *I also explained to Mr. James that teachers could discuss controversial issues in school when they were timely and pertinent to the course being taught, but that right also carried with it the obligation to present objectively all known points of view on the issues. Having done this, the teacher could let it be known what his personal views were—emphasizing the rights of others to hold opposing views.*" (Emphasis supplied.)

This sworn statement (which is not controverted) is the key to the present case, as far as the merits of the controversy are concerned.

The statement is entirely in keeping with the concept of good education and as such with the various codes of ethics existing on this point for both teachers and school boards. It is, more particularly, submitted that the statement in no way interferes with the First Amendment rights of the teacher.

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* Appendix, p. 22a.

The teacher has no constitutionally protected right to indoctrinate his students with his own views, strong as the inclination to do so may be. It is his function to present the entire subject to his students, impart complete information on all sides of a controversial issue to them, and, most importantly, to provide an opportunity for questions, discussion and debate—provided always (1) that the subject falls within the teaching duties and expertise of the teacher and (2) that the specific question has been reached in the orderly development of the curricular context.

The educational processes cannot be effective unless these principles are carefully observed.

Assume, for instance, that a mathematics teacher feels strongly about certain issues relating to abortion and that he urges his own partisan views on his students, verbally or otherwise; or assume that a chemistry teacher urges his own partisan views about the death penalty on his students. This cannot serve the educational process, especially when the teacher is not the designated expert on these subjects.

If he does so verbally, thus taking class time away from his assigned subject, the *Goldwasser* case* disposes of that problem, even based on the much too narrow view of that decision taken by the Court below.

But if he does so, without taking class time, he necessarily eliminates the basic precept of free speech, the freedom to exchange ideas, to discuss and debate, without which the

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* *Goldwasser* v. *Brown*, 417 F. 2d 1169, cert. den. 397 U. S. 922, which the Court below sought to distinguish on this very basis. Actually, the Court based its decision on three grounds, two of which clearly apply to, and are supportive of, the decision of the Commissioner so improperly invalidated in this action: (1) The time limitations involved; (2) the fact that Goldwasser was deviating from his curricular context, and (3) the effect on the students.

concept of freedom of speech loses all of its meaning.* Such a course of conduct, indeed, imposes the "pall of orthodoxy" on the classroom.

As Mr. Justice DOUGLAS pointed out in *Terminiello* v. *Chicago*, 337 U. S. 1, 4:

> "[The] function of free speech under our system of government is to invite dispute."

But what kind of dispute can be offered by a student in an English class who is supposed to pay attention to the subject matter of English instruction, and who may or may not wish to dispute the theories espoused by the English teacher's black armband? He is learning the teacher's views on an aspect of the subject of social studies as to which he is clearly barred, by circumstances, from inquiry and debate. Thus the whole basis for constitutional protection of free speech is here clearly lacking.

As Judge KAUFMAN stated (45 N. Y. U. Law Review 761): "The First Amendment is basically aimed at regulating the process of exchanging ideas and forming opinions." The English teacher and his armband, however, offer no opportunity for an *exchange* of ideas—he offers only one-sided indoctrination.

When Judge LEARNED HAND said ". . . we must not yield a foot upon demanding a fair field and an honest race to all ideas" (T. Dilliard "Learned Hand, The Spirit of

---

* Jefferson expressed this so well, when he said:

> ". . . that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them."

(The works of Thomas Jefferson, Paul L. Ford, ed., N. Y. 1904, II. 440-41.)

Liberty", 284, 3rd ed. 1960), he decided the merits of the cause at bar. The English teacher with his armband interferes with the "honest race," and destroys the "fair field".

To educate means to shape the mind of the student by imparting all available knowledge and giving the student a complete basis for forming his own opinions on issues and questions.

It is important to recognize that the teacher in the classroom does not deal with his peers. Very few students will be able to discount such deviations from the concept of true teaching. Thus, even where the teacher's views are imparted without taking class time, as here, the present impact on the student will cause the student's mind to wander from the scheduled subject, especially in the many cases where parental teachings and opinions conflict with the view thus expressed by the teacher—with the result of actual interference with the educational process, even though the student remains silent, present and seated in his class. Nor can it be expected that the students in such cases will have strong enough convictions or indeed sufficient factual information to lodge an objection or protest with a teacher. He is there to learn, both through express verbal teaching and by the example and conduct of the teacher.

It is *Amicus'* position, in short, that not only external interference with the educative process, such as through physical violence, protest demonstration, destruction of property and the like, must be dealt with by the Board of Education, but that the Board of Education is equally responsible for protecting the inner workings of the education process, by eliminating any course of conduct that improperly interferes with the development of an informed student's mind.

The needs of education in this respect have long been recognized by the educational community of the State. About 1950 the New York State School Boards Association (representing practically all school boards in the State) and the New York State Teachers Association (representing the vast majority of the teachers of the State outside of the City School District of the City of New York), jointly adopted a Code of Ethics, based on lengthy study and consideration by joint and separate committees. While the State Teachers Association has changed its adherence from that Code to the Code of Ethics adopted by the National Education Association, the principles enunciated in all these Codes are the same on the subject.

The former Joint Code required both teacher and school board to "refrain from using the school to promote personal views on religion, race or partisan politics." The School Board Code (adopted 1960) requires the board to "preserve the *right and obligation* of teachers to teach controversial issues fairly and without bias." (Emphasis supplied.) The National Education Association Code (adopted 1970) requires the teacher not to "deny the student access to varying points of view"; "not [to] use professional relationships with students for private advantage"; and "not [to] use institutional privileges . . . to promote political candidates or partisan political activities".

In this context, it is also noteworthy that this principle is also recognized by today's high school and college students themselves, as indicated in a recent Gallup poll, reported in the September 1972 issue of the Reader's Digest, page 78. The following appears on page 82:

> "What can be done to bring the forces of left and right into better balance throughout the country? The responses of the young point the way. All the groups that we questioned, including both extremes, accept the

principle that 'high schools and colleges have a responsibility to see that students are presented with both sides when political issues are discussed.' In not one of the groups was the vote in favor of this principle less than 87 percent. Moreover, the same agreement was found with respect to textbooks and reading matter used in courses that deal with political and social problems. The percentage of those who agree that 'both liberal and conservative viewpoints should be presented' was also in the high 80s.

On a far tougher, more revealing question, a majority agreed with the principle of maintaining ideological balance. The question was: 'In colleges where a majority of the professors in the social sciences are conservative or liberal, should the next professors appointed be of the opposite view—assuming that they are equally qualified to teach?' The vote was 54 percent "yes," 27 percent "no."

The important fact is that young Americans accept the general principle that students should be exposed to both conservative and liberal viewpoints—with the opportunity and the right to make up their own minds on the basis of a full and fair presentation of both sides of political issues. This is a challenge from the young that our institutions of higher learning must now soberly consider—and act upon forthwith—if we are to have a truly informed electorate capable of making intelligent judgments in the critical years ahead."

In sum, if the merits were to be reached, we would ask the Court to find an accommodation of the right of free speech on one side, and the essential needs of the public school system which are so intimately intertwined with our constitutional fabric, on the other side.

Hence, even if the merits of this controversy could be reached for adjudication, which we submit is impossible on this record, the judgment below would, nevertheless, need to be reversed in any event.

POINT IV

The existence of a substantial federal question is in any event foreclosed by previous holdings of this Court.

Respondent claims jurisdiction pursuant to 28 U. S. C. section 1343, subdivision 3 and 42 U. S. C. section 1983.

In order to find jurisdiction in the Federal Courts, therefore, it is necessary to find that under color of State Law respondent has been deprived of a right or privilege secured to him by the United States Constitution.

1. There is no question whatever but that respondent has the right freely to express his opinions. No constitutional right, however, is unlimited. Respondent could not, for instance, use the Federal Courtroom for the purposes of making a speech expressing his opinions on whatever problems he chooses to address himself to.

2. In the setting of the public school system, the students are a captive audience. They are required to be present, except to the extent that they wish to attend nonpublic school; they are required to listen to the teachers, to obey their commands and to participate in whatever program the teacher sets before them.

The pupils are taught by their parents and others to look up to, obey and emulate their teachers. Thus, the teacher has the very delicate, highly responsible and most important obligation to teach these young minds all the facts in his subject which they must know in order to enter the mainstream of society, through developing informed opinions.

3. There is no right or privilege secured to any teacher by the United States Constitution to abuse his highly responsible and delicate position as a teacher by using the

captive audience of his students to teach them his own partisan opinions to the exclusion of all other views on the subject.

Respondent herein is a teacher of English; it is not his job to teach foreign affairs, social studies, mathematics or any other subject except the English language.

By wearing his black armband he unilaterally taught them that the United States foreign policy is wrong.

By wearing a red armband with a white inset showing the hammer and sickle he would teach them that all so called "capitalism" is wrong.

By wearing a red armband with a white inset showing the swastika he would teach them that "democracy" is wrong and that the Jews are responsible for all the ills of this world.

By wearing an orange armband on St. Patrick's Day he would teach them that the Roman Catholic Church is wrong and responsible for all sorts of troubles.

The potential list of uses of this type of symbolic speech is rather lengthy since not limited to the wearing of armbands, and the list can be widely expanded as new symbols and new issues arise or old issues reemerge*.

In all these manifestations of symbolic teaching *out of context*, of course, it must be kept in mind that no opportunity for inquiry, debate and discussion exist, so that, as pointed out in Point III, *supra*, the very basis for the concept of free speech and its constitutional protection is lacking.

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* *Cf. Lapolla* v. *Dullaghan*, 63 Misc. 2d 157 (lowering of flag); *Nistad* v. *Board of Education*, 61 Misc. 2d 60 (closing of school); *O'Connor* v. *Hendrick*, 184 N. Y. 421 (religious garb).

This type of indoctrination is, of course, violative of the basic requirement of *governmental neutrality* in matters of religion and politics.

The following language from the decision of the United States Supreme Court in *West Virginia* v. *Barnett*, 319 U. S. 624, is here dispositive:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . ."

and again:

> "Free public education, if faithful to the ideal of secular instruction and political neutrality will not be partisan or enemy of any class, creed, party or faction."

The following statements of this Court in the *Cox* cases (379 U. S. 536 and 559) are here directly in point:

> "From these decisions certain clear principles emerge. The right of free speech and assembly, while fundamental in our democratic society still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excess of anarchy." (p. 554.)

and further:

> "We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." (p. 574.)

Paraphrasing another statement of this Court from page 564:

> "We hold that this [decision] on its face is a valid [decision] dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection."

The requirement of complete neutrality of the school system in matters of religion, politics and other controversial areas has been announced again and again by this Court:

Meyer v. *Nebraska*, 262 U. S. 390;
United Public Workers v. *Mitchell*, 330 U. S. 75;
Engel v. *Vitale*, 370 U. S. 421;
Adderly v. *Florida*, 385 U. S. 39, 48;
Board of Education v. *Allen*, 392 U. S. 236, 242;
Epperson v. *Arkansas*, 393 U. S. 97;
Walz v. *Tax Commission*, 397 U. S. 664;
Lemon v. *Kurtzman*, 403 U. S. 602, 618.

It is respectfully submitted, therefore, that the existence of a substantial Federal question is here completely foreclosed in any event by previous decisions of this Court. The judgment below must, therefore, be reversed.

Conclusion

The Court below pronounced judgment against the Commissioner of Education without ever acquiring jurisdiction over his person.

Absent such jurisdiction and absent a review of the decision of the Commissioner in the Federal Courts (or even State Courts) the decision of the Commissioner has become *res judicata.*

The existence of a substantial Federal question here is clearly foreclosed by previous decisions of this Court.

In addition, the judgment below ignores fundamental and compelling State interests in protecting the educative processes.

The judgment below was in error in authorizing partisan political activity in contravention of the precepts of the requirement of governmental neutrality in matters of politics and religion.

For all these reasons the judgment below must be reversed.

Respectfully submitted,

JOHN P. JEHU,
Associate Counsel,
Attorney for Commissioner of Education, Amicus Curiae,
State Education Building,
Albany, New York 12224,
Tel: (518) 474-6150.

ROBERT D. STONE,
Counsel and Deputy Commissioner for Legal Affairs.

APPENDIX A

NYCLU
New York Civil Liberties Union,
84 Fifth Avenue, New York, N. Y. 10011,
Telephone 924-7800.

BURT NEUBORNE,
Staff Counsel.

October 9, 1972.

John P. Jehu
The University of the State of
New York
The State Education Department
Albany, New York 12224

Dear Mr. Jehu:

Mr. Neuborne has instructed me to reply to your letter of September 29, 1972. He has no objection to the filing of a Brief *Amicus Curiae* by the Commissioner of Education in the *James* case.

Very truly yours,

TOBY JO PLATT,
TOBY JO PLATT

Received
Oct 12 1972
Office Of The
Counsel

APPENDIX B

HARRY TREININ
Attorney at Law
11 East Market Street
Corning, N. Y. 14830
Telephone 962-3167
Area Code 607

October 2, 1972

Dr. John P. Jehu
Associate Counsel
Education Department
State Education Building
Albany, New York 12224

Re: James case

Dear Dr. Jehu:

As counsel to the Board of Education, Central School District No. 1, Towns of Addison, *et al*, which is filing a petition for certiorari to the United States Supreme Court in the above matter, I would most welcome your filing of a brief on behalf of the Commissioner of Education as *amicus curiae*.

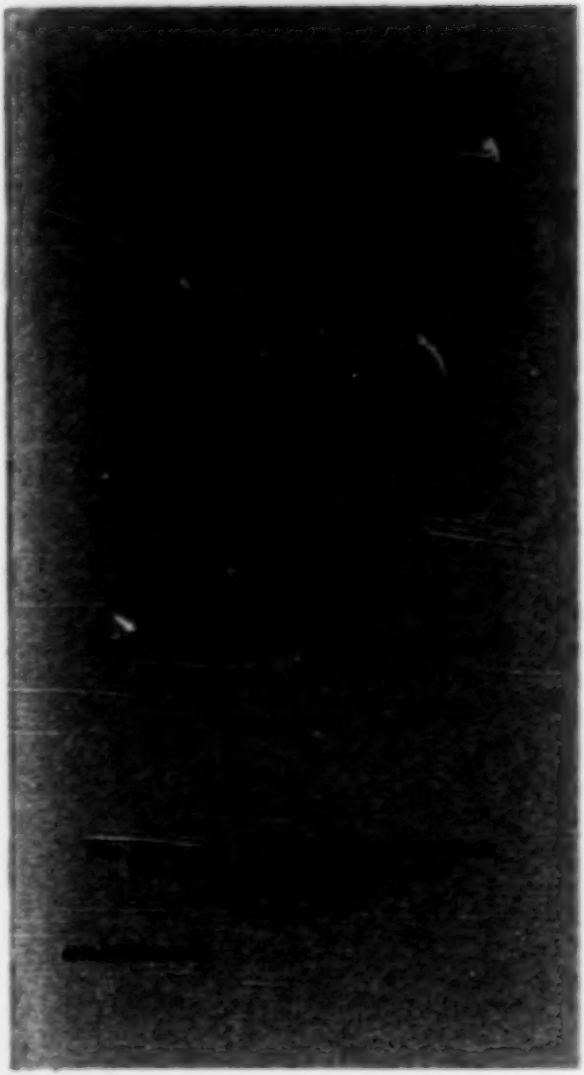
Sincerely yours,

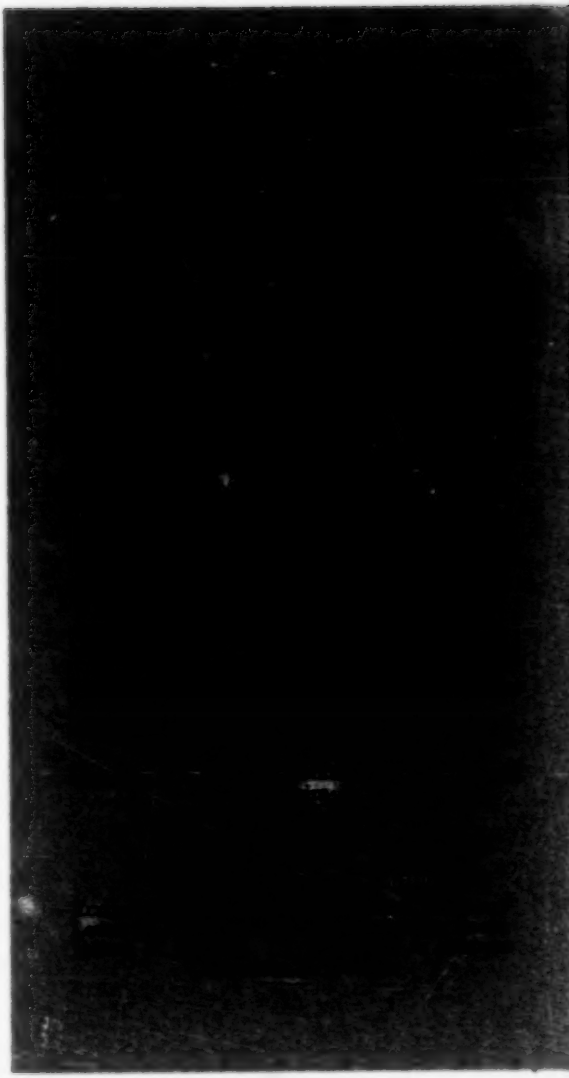
klr

HARRY TREININ
HARRY TEININ

Received
Oct 4 1972
Office Of The
Counsel

APPENDIX 1





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FOREWORD

Education Law section 310 provides that any person considering himself aggrieved by any action taken at a school district meeting or by school authorities may appeal to the Commissioner of Education for a review of such action.

In order to provide orderly and expeditious procedures for the presentation and defense of such appeals, and for the conduct of proceedings for the removal of school officials pursuant to Education Law section 306, the Commissioner of Education has from time to time promulgated regulations governing the practice to be followed.

In order to keep pace with current thinking concerning practice in quasi-judicial proceedings, the regulations of the Commissioner governing practice on appeals under section 310 have been substantially revised, effective November 1, 1969. Those familiar with the prior regulations will note the following major changes:

- the material has been reorganized under two major headings — parties and pleadings, and rules of practice.
- each petition initiating an appeal must be accompanied by a notice advising the respondent of his right to file and serve an answer.
- the regulations have been renumbered to correspond with the numbering system used in the Official Compilation of Codes, Rules and Regulations of the State of New York, in which the regulations of all state departments and agencies are published.
- provision has been made for the first time for bringing of class appeals.
- specific provision has been made for appearances amicus curiae.
- procedures are specific governing applications for extension of time to answer or reply, for adjournment of oral argument, and for reopening and reargument.

With the hope that ready access to the revised regulations will be of assistance to those wishing to bring appeals to the Commissioner, to those against whom such appeals may be brought, and to their attorneys, the regulations and the applicable statutory provisions are set forth in this pamphlet.

ROBERT D. STONE
Counsel and Deputy Commissioner for Legal Affairs
State Education Department

August 1, 1969

Selected Sections of the Education Law

Appeals or Petitions to Commissioner of Education

Article 7 of the Education Law provides in part as follows:

§ 310. **Appeals or petitions to commissioner of education and other proceedings.** Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

§ 311. **Powers of commissioner upon appeals or petitions, et cetera.** The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribe conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision.

§ 312. **Filed papers and copies thereof.** The commissioner shall file, arrange in the order of time, and keep in his office, so that they may be at all times accessible, all the proceedings on every

appeal or petition to him under this article, including his decision and orders founded thereon; and copies of all such papers and proceedings, authenticated by him under his seal of office, shall be evidence equally with the originals.

Appeals in Special Cases

Reviewability of acts of district superintendents:

§ 2217. **Appeals from acts of district superintendent.** Appeals from the official acts of a district superintendent of schools or from his refusal or failure to act in any matter in which he may legally act, may be taken to the commissioner of education. All questions in controversy relating to the election of such district superintendent shall be determined by the commissioner of education on proper appeal. The provisions of article seven of this chapter shall apply to and govern such appeals and decisions therein.

Determination of disputes involving meetings or elections:

§ 2037. **Determination of meeting or election disputes.** All disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election shall be referred to the commissioner of education for determination and his decisions in the matter shall be final and not subject to review. The commissioner may in his discretion order a new meeting or election.

Determination of what constitutes ordinary contingent expenses:

§ 2024. **Reference to commissioner of education.** If any question shall arise as to what are ordinary contingent expenses the same may be referred to the commissioner of education, by a statement in writing, signed by one or more of each of the opposing parties upon the question, and the decision of the commissioner shall be conclusive.

Enforcement

As an aid in the enforcement of the law and the decisions of the Commissioner of Education, section 306 of the Education Law provides as follows:

§ 306. **Removal of school officers; withholding public money.** 1. Whenever it shall be proved to his satisfaction that any trustee, member of a board of education, clerk, collector, treasurer, district superintendent, superintendent of schools or other school officer is a member of an organization listed as subversive by the board of regents pursuant to the provisions of section three thousand twenty-two of this chapter, or has been guilty of any wilful violation or neglect of duty under this chapter, or any other act pertaining to common schools or other educational institution participating in state funds, or wilfully disobeying any decision, order, rule or regulation of the regents or of the commissioner of education, said commissioner, after a hearing at which the school officer shall have the right of representation by counsel, may, by an order under his hand and seal, which order shall be recorded in his office, remove such school officer from his office.

2. Said commissioner of education may also withhold from any district or city its share of the public money of the state for wilfully disobeying any provision of law or any decision, order or regulation as aforesaid.

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Part 275

Parties and Pleadings

§ 275.1. **Parties.** The party commencing an appeal shall be known as petitioner or appellant and any adverse party, as respondent. After an appeal is commenced in accordance with these rules, no party shall be joined or be permitted to intervene, except by leave or direction of the Commissioner of Education.

§ 275.2. **Class appeals.**

(*a*) When allowed, an appeal may be maintained by one or more individuals on their own behalf and as representatives of a class of named or unnamed individuals only where the class is so numerous that joinder of all members is impracticable and where all questions of fact and law are common to all members of the class. Minor variations of fact shall not preclude the maintenance of a class appeal when such variations are irrelevant for purposes of the decision.

(*b*) Protective orders. The Commissioner may at any stage of the appeal issue such orders as may be necessary to fairly and adequately protect the interests of the persons on whose behalf the appeal is brought.

§ 275.3. **Types of pleadings.** There shall be a petition, an answer, and, if new matter is alleged in the answer, a reply thereto. The Commissioner may permit or require additional pleadings upon such terms and conditions as he may specify. The form of all pleadings shall be so construed as to do substantial justice. All pleadings must be typewritten, addressed "To the Commissioner of Edu-

cation," must contain the allegations of the parties in numbered paragraphs and must be filed in accordance with section 275.9 of this Part.

§ 275.4. **Names of parties or attorneys to be endorsed on all papers.** All pleadings and papers submitted to the Commissioner in connection with an appeal must be endorsed with the name, post office address and telephone number of the party submitting the same, or, if a party is represented by counsel, with the name, post office address and telephone number of his attorney.

§ 275.5. **Verification.** All pleadings shall be verified. The petition must be verified by the oath of at least one of the petitioners, except that when the appeal is taken by the trustee or the board of trustees or board of education of a school district, it must be signed by one of such trustees or a member of such board who is familiar with the facts underlying the appeal, pursuant to a resolution of such board authorizing the commencement of such appeal on behalf of such trustees or board. An answer shall be verified by the oath of the respondent submitting the same. If, however, the appeal is brought from the action of the trustee or the board of trustees or board of education of a school district, verification of the answer shall be made by one of such trustees or a member of such board who is familiar with the facts underlying the appeal. If two or more respondents are united in interest, verification of the answer must be made by at least one of them who is familiar with the facts. A reply shall be verified in the manner set forth for the verification of an answer.

§ 275.6. **Affidavit of verification.** The affidavit of verification shall be in the following form:

STATE OF NEW YORK }
COUNTY OF ..... } ss

.....being duly sworn, deposes and says that he is..... in this proceeding; that he has read the annexed ..... and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

.....
[*Signature*]

Subscribed and sworn to before me
this ..... day of .....
19.....

.....
[*Signature and title of officer*]

§ 275.7. **Oaths.** All oaths required by these rules may be taken before any person authorized to administer oaths within the State of New York. The statement of an attorney admitted to practice in the courts of this State and appearing in an appeal as attorney of record or of counsel to the attorney of record, when subscribed and affirmed by him to be true under the penalty of perjury, may be served or filed in the appeal in lieu of and with the same force and effect as an affidavit.

§ 275.8. **Service of pleadings and supporting documents.**

(*a*) *Petition.* A copy of the petition and of all papers annexed thereto shall be personally served upon each named respondent, or, if he cannot be found upon diligent search, by delivering and leaving the same at his residence with some person of suitable age and discretion, between six o'clock in the morning and nine o'clock in the evening. If a school district is named as a party respondent, service upon such school district shall be made personally by delivering a copy of the petition to the district clerk or to any trustee or any member of the board of education of such school district. Pleadings may be served by any person not a party to the appeal over the age of 18 years.

(*b*) *Subsequent pleadings and papers.* All subsequent pleadings and papers shall be served upon the adverse party, or if the adverse party is represented by counsel, upon his attorney. When the same attorney appears for two or more parties, only one copy need be served upon him. Service of all pleadings subsequent to the petition shall be made by registered mail, return receipt requested, or by personal service.

(*c*) *Award of bid.* If an appeal involves the award of a contract pursuant to Article 5-A of the General Municipal Law or pursuant to subdivision 14 of section 305 of the Education Law and a party other than the appellant has been designated as the successful bidder or has been awarded a contract, such successful bidder must

be joined as a respondent and must be served with a copy of the petition. In such case, the respondent board of education or board of trustees shall forward to the Commissioner within twenty days after service of the petition on appeal, a copy of the notice to bidders together with proof of publication thereof, a copy of the specifications and copies of all bids or proposals.

(*d*) *Disputed elections.* If an appeal involves the validity of a school district meeting or election or the eligibility of a district officer, a copy of the petition must be served upon the trustee or board of trustees or board of education as the case may be, and upon each person whose right to hold office is disputed and such person must be joined as a respondent. In such case, except where the eligibility of a district officer is involved, any qualified voter may serve and file an answer in such appeal, whether or not the trustee or board of trustees or board of education serves and files an answer therein.

§ 275.9. **Filing.** Within five days after the service of any pleading or paper, the original, together with the affidavit of verification, an affidavit proving the service of a copy thereof and the registry receipt where service by registered mail has been effected shall be transmitted to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12224. The affidavit of service shall be in the form set forth below and shall indicate the name and official character of the person upon whom service was made.

Form for Affidavit of Personal Service

STATE OF NEW YORK }
COUNTY OF ..... } ss

....., being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the ..... day of ....., 19....., at No. ..... Street, in the town of ....., county of ....., State of New York, he served the annexed ..... on ..... by delivering to and leaving with said ....at said time and place a true copy thereof.

Deponent further says he knew the person so served to be the said ....., who is .... in said district.

.....
[*Signature*]

Subscribed and sworn to before me
this ..... day of .....,
19.....

.....
[*Signature and title of officer*]

Form of Affidavit of Service by Registered Mail

STATE OF NEW YORK }
} ss
COUNTY OF ..... }

....., being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the ..... day of ....., 19....., deponent served the within ..... upon ..... in this action, at ....., the addresses designated by ..... for that purpose by depositing a true copy of the same by registered mail, return receipt requested, enclosed in a postpaid properly addressed wrapper, in ..... a post office ..... official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

.....
[*Signature*]

Subscribed and sworn to before me
this day of
19

§ 275.10. **Contents of petition.** The petition shall contain a clear and concise statement of the petitioner's claim showing that the petitioner is entitled to relief, and shall further contain a demand for the relief to which the petitioner deems himself entitled. Such statement must be sufficiently clear to advise the respondent of the nature of petitioner's claim and of the specific act or acts complained of.

§ 275.11. **Notice with petition.** Each petition must contain the following notice:

"NOTICE:

You are hereby required to appear in this appeal and to answer the allegations contained in the petition. Your answer must conform with the provisions of the Rules Relating to Appeals Before the Commissioner of Education, copies of which are available from the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12224.

If an answer is not served and filed in accordance with the provisions of such Rules, the statements contained in the petition will be deemed to be true statements, and a decision will be rendered thereon by the Commissioner.

Please take notice that such Rules require that an answer to the petition must be served upon the petitioner, or if he be represented by counsel, upon his counsel, within 20 days after the service of the appeal, and that a copy of such answer must, within five days after such service, be filed with the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12224."

§ 275.12. **Contents of answer.** The answer of each respondent shall contain a clear and concise statement of his defenses to each claim and shall either admit or deny the allegations of the petition. In addition, each respondent may set forth affirmative defenses or defenses by way of avoidance. If more than one respondent has been named and served and if common questions of law or fact are involved, the respondents, if otherwise united in interest, may submit a joint answer to the petition.

§ 275.13. **Service of answer.** Each respondent upon whom a copy of the petition has been served must, within 20 days from the time of such service, answer the same, either by concurring in a statement of facts with the petitioner or by service of an answer, together with any necessary supporting documentation. The date upon which personal service was made upon respondent shall be excluded in the computation of the 20-day period. If the last day for service of an answer falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

§ 275.14. **Reply.** The petitioner shall reply to each affirmative defense contained in an answer. The reply shall be served within 10 days after service of the answer to which it responds in the manner set forth in section 275.8 (*b*). If the answer has been served by mail upon petitioner or his counsel, the date of mailing and the two days subsequent thereto shall be excluded in computing the 10-day period. If the last day for service of reply falls on

a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

§ 275.15. **Representation by attorney.** A party other than a school district or a corporation may prosecute or defend an appeal before the Commissioner in person or by an attorney. A school district or a corporate party may appear only by an attorney.

§ 275.16. **Limitation of time for initiation of appeal.** An appeal to the Commissioner must be instituted within thirty days from the making of the decision or the performance of the act complained of. The Commissioner, in his sole discretion, may excuse a failure to commence an appeal within the time specified for good cause shown. The reasons for such failure shall be set forth in the petition.

§ 275.17. **Amicus curiae.** The Commissioner may, in his sole discretion and upon written application submitted at or before oral argument, permit interested persons or organizations to submit memoranda of law amicus curiae in connection with a pending appeal. Those permitted to submit memoranda amicus curiae shall not be considered parties to the appeal before the Commissioner and shall not be entitled to receive copies of pleadings and papers pertaining thereto or to participate in oral argument.

Part 276

Rules of Practice

§ 276.1. **Stay of proceedings.** The initiation of an appeal shall not, in and of itself, effect a stay

of any proceedings on the part of any respondent. If the petitioner desires a stay, he shall make application therefor by a duly verified petition, stating the facts and the law upon which such stay should be granted. The Commissioner may, in his discretion, with or without application therefor, grant a stay if in his judgment the issuance of such a stay is necessary to protect the interests of the parties, or any of them, pending an ultimate determination of the appeal.

§ 276.2. **Oral argument.**

(*a*) If a petitioner desires an opportunity for oral argument before the Commissioner, a request therefor must be clearly set forth in the petition. If no such request is made, the respondent, or if there be more than one, a respondent may request oral argument at any time prior to or with the service of an answer. If a petitioner has failed to request oral argument but respondent has made a time by request, petitioner may, within two weeks from receipt of respondent's request, request oral argument on his own behalf.

(*b*) The Commissioner may, in his sole discretion, determine whether oral argument shall be had.

(*c*) Argument on appeals to the Commissioner may be heard before the Commissioner, the Acting Commissioner or the Counsel.

(*d*) All evidentiary material shall be presented by affidavit or by exhibits. No testimony is taken and no transcript of oral argument will be made.

(*e*) Adjournment of the date of oral argument. Once an appeal has been scheduled for oral argu-

ment on a particular date by the Office of Counsel and due notification has been given to the respective parties or their attorneys, no adjournments of that date will be granted by the Commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the Office of Counsel, must be postmarked not later than five days prior to the date on which oral argument is scheduled to be heard, and shall set forth in full the reasons for the request.

(*f*) The maximum time allotted for oral argument will be 20 minutes for each party except in extraordinary cases where, upon application, the Commissioner extends such time.

§ 276.3. **Extensions of time to answer or reply.** No extension of time to answer the petition or to reply to an answer will be granted by the Commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, address to the Office of Counsel, must be postmarked not later than five days prior to the date on which the time to answer or reply will expire, and shall set forth in full the reasons for the request. The time to answer a pleading may not be extended solely by stipulation of the parties or their counsel.

§ 276.4. **Briefs.** Memoranda of law may be submitted by any party to an appeal or by an amicus curiae, and may be requested by the Commissioner or by his Counsel.

§ 276.5. **Records and reports.** The Commissioner may, in his discretion, in the determination

of an appeal, take into consideration any official records or reports on file in the Education Department which relate to the issues involved in such an appeal.

§ 276.6. **Decisions to be filed.** A copy of the decision of the Commissioner in an appeal will be forwarded by the Office of Counsel to all parties to the appeal, or, if they be represented by counsel, to counsel for the respective parties, with instructions for service and filing as may be appropriate. A copy will also be sent to those persons or organizations who have been granted leave to submit memoranda amicus curiae.

§ 276.7. **Reopening of a prior decision.** Any party to an appeal may, within 30 days after the date of a decision thereon, appeal to the Commissioner for a reopening of said decision and for a reconsideration thereof. Service of the application shall be made in the manner set forth for service of an answer. Motions for reopening of a prior decision are addressed solely to the discretion of the Commissioner and will not be granted in the absence of a showing that the decision appealed from was rendered under a misapprehension as to the facts or that there is new and material evidence which was not available at the time the original decision was made. Affidavits in opposition to an application for reopening may be submitted by any parties opposing the same. No oral argument shall be had in connection with an application for reopening. If the Commissioner finds that there is no adequate basis for a reopening, he will render a decision to the effect.

§ 276.8. **Reargument.**

(*a*) If the Commissioner, in his discretion, is satisfied that justice will be served by reconsideration of the decision, he will give notice of his decision to all of the parties to the initial decision. The provisions relating to practice and pleadings shall be applicable, and, for the purpose of reargument, the application for reopening shall be treated as the petition. In such case, the Commissioner may define and limit the issues to be considered and may restrict the time for service of pleadings.

(*b*) The Commissioner may, on his own motion, reopen a prior decision in the absence of an application therefor where in his judgment the interests of justice will be served thereby.

§ 276.9. **Dismissal of appeal.** The Commissioner may, in his discretion, and at any stage of the proceedings, dismiss an appeal if it appears to his satisfaction that the petition does not set forth a clear and concise statement of the petitioner's claim or that the appeal has become academic.

Part 277

Practice on Application for Removal of School Officers

§ 277.1. **Initiation and conduct of proceeding.** An application seeking the removal of a school officer must be made in accordance with Parts 275 and 276 hereof, as far as possible, except

(*a*) the petition must distinctly state the wilful violation of law, neglect of duty, or wilful disobedience of a decision, order or regulation of the

Commissioner charged against the officer and the facts by which it is established; such facts must be set forth with such certainty as to time, place and all other pertinent details, as to furnish the officer with precise information as to what he is expected to meet; if the charge is wilful disobedience of a decision or order of the Commissioner, a copy thereof must be attached to the petition;

(*b*) the petition must include a notice to the officer in substantially the form on the following page:

"SIR:

Take notice that the petition and affidavits, copies of which are herewith served upon you, will be presented to the Commissioner of Education at Albany, and application thereon made for your removal from the office of..... of..... School District number ..... of the Town of..... .....County, and that you are required to transmit your answer to such application, duly verified, with an affidavit of service of a copy thereof upon petitioner, to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York, 12224, or the charges contained in such petition and affidavit will be deemed to be admitted by you.

.....
[*Signature*]

P.O. Address....."

§ 277.2. **Initiation by Commissioner.** Such proceeding may be instituted by the Commissioner upon his own motion by the service of an order to show cause and thereafter the procedure as outlined in Parts 275 and 276 hereof shall be followed so far as applicable.

§ 277.3. **Authorized hearing officers.** Hearings and proceedings for removal of school officers may be held before the Acting Commissioner of Education or the Counsel.

The following is a conversion table indicating the amended regulations and showing their present equivalents in Title 8, Official Compilation, Codes, Rules and Regulations:

275.1	Added
275.2	Added
275.3	276.1, 276.6, 276.7
275.4	275.3, 276.11 (b)
275.5	276.10
275.6	276.10
275.7	276.8 (a)
275.8 (a)	276.4 (a) (1)
(b)	276.6 (b)
(c)	276.4 (a) (3)
(d)	276.4 (a) (2)
275.9	276.4 (c), 276.6 (c)
275.10	275.1, 275.2
275.11	Added
275.12	276.6
275.13	276.6 (b)
275.14	276.7
275.15	Added
275.16	276.5

275.17	Added
276.1	276.9
276.2 (a)	Added
(b)	276.12 (a)
(c)	276.12 (b)
(d)	276.12 (d)
(e)	Added
(f)	276.12 (c)
276.3	Added
276.4	Added
276.5	276.14
276.6	276.13 (b)
276.7	Added
276.8	Added
276.9	Added
277.1 a	277.1 a
277.1 b	277.1 b
277.2	277.2
277.3	277.3

The following is a conversion table indicating the present sections as numbered in Title 8, Official Compilation, Codes, Rules and Regulations of the State of New York and their equivalent sections under the amended regulations:

276.1	275.3, 275.5
276.2	Omitted
276.3	Omitted
276.4 a 1	275.8 a
2	275.8 d
3	275.8 c
b	275.8 a
c	275.9
276.5	275.16

276.6	a	Omitted
	b	275.13, 275.1
	c	275.9
276.7		275.14
276.8	a	275.5, 275.6, 275.7
	b	Omitted
276.9		276.1
276.10		275.5, 275.6
276.11	a	Omitted
	b	275.4
276.12	a	276.2 (a) (b)
	b	276.2 (c)
	c	276.2 (f)
	d	276.2 (d)
276.13	a	Omitted
	b	276.6
276.14		276.5
277.1 a		2771. a
277.1 b		277.1 b
277.2		277.2
277.3		277.3

APPENDIX 2

(SEAL) No. 8195

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
Before the Commissioner

In the Matter
of
The Appeal of CHARLES JAMES from action of the Board of Education of Central School District No. 1 of the Towns of Addison, Cameron, Rathbone, Tuscarora, Woodhull, Thurston, Erwin, Lindley and Canisteo, Steuben County, relating to the dismissal of a probationary teacher.

Levy, Gutman & Goldberg, Esqs., Attorneys for Petitioner, Jeremiah S. Gutman, Esq., of Counsel.
Harry Treinin, Esq., Attorney for Respondent.

Petitioner, a probationary teacher of English at Addison Central High School in respondent's district, was suspended by respondent for wearing a black armband in class on November 14, 1969, a Vietnam Moratorium Day. Thereafter, he was informed by respondent that he could return to his teaching duties with the understanding that he "engage in no political activity while in the school." On December 12, 1969, another Vietnam Moratorium Day, petitioner again wore a black armband to class. As a result of this action, petitioner was suspended on that day and, on January 13, 1970, was dismissed in accordance

with the provisions of Education Law section 3013, subdivision 1. The pertinent part of that subdivision reads as follows:

> "Teachers shall be appointed for a probationary period of not to exceed five years . . . Services of a person so appointed . . . may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education."

Commissioners of Education, as well as the Courts, have consistently held that such probationary teachers have no vested rights to be continued in their positions and that the services of a probationary teacher may be discontinued without a hearing and without giving or explaining the reasons for such action.

> "The making of a permanent contract with tenure constitutes a long commitment that should not be incurred without the most careful consideration. The screening of candidates by the principal and district superintendent to select those whose technical training and experience make them eligible for consideration is doubtless a wise requirement of the law. On the other hand, it may well be that a teacher with satisfactory technical qualifications might have certain personal characteristics and attitudes that would prevent him from acting in harmony with his associates and fitting into the requirements of a particular school. In such a case the judgment and discretion of the board, made up of men and women of standing and experience, are most valuable safeguards in the selection of a permanent teaching staff for carrying on the work of the school. The Legislature has not seen fit to abrogate the power of the board in making permanent contracts."

(*McMaster* v. *Owens*, 275 App. Div. 506, 509.)

Appendix 2

(*Peo. ex rel. Graves* v. *Barber,* 193 Misc. 326; *Carter* v. *Kalamejski,* 275 App. Div. 604, affd. 280 N. Y. 803; *Walcott* v. *Fisher,* 274 App. Div. 339, affd. 299 N. Y. 688; *Hickey* v. *Carey,* 275 App. Div. 949; *Board of Education* v. *Allen,* 283 App. Div. 376; *Pinto* v. *Wynstra,* 22 AD 2d 914; Matter of Coleman (1920), 22 State Dept. Rep. 322; *Matter of Coleman,* 69 *id.* 20; *Matter of Sullivan,* 74 *id.* 52; *Matter of McIntyre,* 2 Ed. Dept. Rep. 197; *Matter of Butler,* 6 *id.* 71, affd. 29 AD 2d 799; *Matter of Nazzaro,* 7 *id.* 31; *Albaum* v. *Carey,* 310 F. Supp. 594.)

The essence of the appeal, however, rests in petitioner's claim that his dismissal was in violation of his constitutional rights.

Petitioner alleges that by wearing a black armband he was exercising his right of free speech under the First Amendment to the United States Constitution, and contends that, by dismissing him respondent has violated this Constitutional right. Petitioner seeks an order reinstating him to his former position with back pay from the date of his dismissal, and directing respondent not to suspend or dismiss him in the future without just cause shown.

Respondent alleges that the wearing of the black armband in class was a political act expounding to the students only one side of a controversial issue and, as such, constituted an unethical practice by a member of the teaching profession. Respondent further alleges that, by wearing a black armband a second time, despite a reasonable direction by respondent not to do so, petitioner was guilty of insubordination. For these reasons respondent contends that its dismissal of petitioner was justified.

Appendix 2

While I fully agree that a board of education has broad powers over a probationary teacher and may dismiss a probationer without giving a reason, the exercise of these powers by a board must be made "within the ambit of the purpose for which they were granted and in a manner consistent with our basic Constitutional framework" (*Matter of Collins*, 9 Ed. Dept. Rep. ____, Decision No. 8051 dated August 26, 1969). Therefore, where it is established that a probationary teacher is dismissed for reasons which may be violative of his Constitutional rights, the mere fact that the procedural requirements of section 3013 have been met will not render an appeal from such a dismissal moot, and a determination of the legality of such action is in order. Respondent's allegation in this regard must therefore be rejected.

Respondent's allegation that petitioner was insubordinate for failing to adhere to its directive not to wear the armband has merit only if the directive was a reasonable exercise of the Board's authority. If respondent's directive violated petitioner's rights, the directive would be unconstitutional and illegal and petitioner's failure to abide by such a rule could not constitute a ground for disciplinary action. The real issue before me then concerns the right of a school teacher in class to wear a black armband which is expressive, though only symbolically, of a specific viewpoint.

Petitioner's position is based largely on the dictum in *Tinker* v. *School District*, 393 U. S. 503, a case dealing solely with the right of *students* to wear the black armband, that (p. 506):

> "It can hardly be argued that either students *or teachers* shed their constitutional right to freedom of speech or expression at the school house gate." (Emphasis supplied.)

No decision of the United States Supreme Court has been found, however, addressing itself directly to the question of the right of teachers to express themselves freely in the classroom on any subject they please, regardless of any relationship between such expression and subject the teacher is engaged to teach.

The *Tinker* decision itself, however, contains other significant language (p. 506):

> "First Amendment rights, *applied in light of the special characteristics of the school environment,* are available to teachers and students." (Emphasis supplied.) ". . . the Court has repeatedly emphasized the need for affirming the comprehensive authority of the State and of school officials, consistent with fundamental constitutional safeguards, to *prescribe and control conduct* in the schools . . . Our problem lies in the area where *students* in the exercise of First Amendment rights collide with the rules of the school authorities." (Emphasis supplied.)

Most important, however, is the following passage from the majority opinion in *Tinker* (p. 508):

> "*Accordingly, this case does not concern speech or action that intrudes upon the work of the school or the rights of other students.*" (Emphasis supplied.)

In *Tinker,* however, the Court also recognized that free speech is subject to regulation when it stated:

> "*We properly read it* [the Constitution] *to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.*" (Emphasis supplied.)

Appendix 2

The Court, even before its decision in *Tinker*, had recognized that although a person had no Constitutional right to public employment, Constitutional protection does extend to public employees whose continued public employment is subject to only reasonable, lawful and nondiscriminatory regulations (*Wieman* v. *Updegraff*, 344 U. S. 183; *Slochower* v. *Board of Higher Education*, 350 *id.* 551). And, as I stated in *Collins:*

> "Absent an overriding public interest regulations which impinge upon individual freedom can have no legal force."

The closest precedent for the present case is the decision of the United States Court of Appeals for the District of Columbia Circuit in *Goldwasser* v. *Brown*, 417 F. 2d 1169, which, like the present case, involved a teacher of English who insisted on discussing foreign policy and matters of racial prejudice in his classes. In upholding the dismissal of that teacher against his claim of interference with his right to free speech, the Court stated (after noting that the public school teacher in *Pickering*, 391 U. S. 563, was not dismissed for anything he said *in* class):

> ". . . appellant was fired for what he said *within* the classroom to foreign officers who were supposed to be learning how to cope with an English-speaking dentist or garage repairman, and not for airing his views outside the classroom to anyone who would listen."
>
> ". . . appellant was not teaching . . . current events, political science, sociology or international relations."

It is a matter of fundamental educational policy that whatever subject of instruction may be involved, the teacher must present the entire range of information available

in relation to such subject. If the subject matter involves conflicting opinions, theories or schools of thought, the teacher must present a fair summary of the entire range of opinion so that the student may have complete access to all facets and phrases of the subject. Petitioner in this case, in wearing the black armband in his classroom, was presenting only one point of view on an important public issue on which a wide range of deeply held opinion and conviction exists.

In line with this basic concept, Dr. Herbert F. Johnson, then Deputy Commissioner of Education for Elementary, Secondary and Continuing Education, on November 3, 1969 sent a memorandum to all school administrators, dealing with "Moratorium Days" and the posture of the public schools in relation thereto. The gist of the communication was the need for neutrality and objectivity on the subject on the part of teachers and administrators, and the need for giving appropriate attention to all sides of the questions involved.

The same concepts are incorporated in the Joint Code of Ethics, adopted both by the New York State School Boards Association and the New York State Teachers Association, which specifically considers as unethical the use of schools by teachers and boards "*to promote personal views on* religion, race or *partisan politics*" and to "*deny the student access to varying points of view.*" (Emphasis supplied.)

The term "partisan politics" is not, of course, limited to the politics of political parties, but embraces any political subject on which differing views exist.

Appendix 2

It is to be noted also that the Courts arrive at the same conclusion from the constitutional point of view. Mr. Justice TITONE, of the Richmond County Supreme Court, in *Matter of Nistad*, 61 Misc. 2d 60, 64, in ordering the Board of Education of the City School District of the City of New York to conduct school as usual on Moratorium Days, stated:

> "The prestige and power of the Board of Education may not be used to support, influence or condone on matters of this nature."

Similarly, the California Supreme Court, in *Goldsmith* v. *Board of Education*, 66 Cal. App. 157, 225 Pac. 783, recognized the problem as follows:

> ". . . it is to be observed that the advocacy before the scholars of a public school by a teacher of the election of a particular candidate for a public office—the attempt thus to influence support of such candidate by the pupils and through them by their parents—introduces in the school questions wholly foreign to its purposes and objects . . ."

The wearing of the black armband has been declared to be symbolic speech, *i.e.*, "closely akin to 'pure speech' " and "the type of symbolic act that is within the freedom of speech provision of the First Amendment" (*Tinker*, *supra*). It follows that such symbolic speech, in the classroom, is a form of teaching and is subject to the strictures of sound pedagogy. The Court of Appeals in *O'Connor* v. *Hendrick*, 184 N. Y. 421, 428, in which the Court held improper the wearing of religious garb by a teacher in a public school classroom, made the following observation:

> "So, also, it would be manifestly proper to prohibit the wearing of badges calculated on particular occasions to constitute cause of offense to a considerable number of pupils, as, for example, the display of orange ribbons in a public school in a Roman Catholic community on the 12th of July." (p. 429.)

It should be noted that much broader limitations on First Amendment rights have been sustained by the United States Supreme Court (see *United Public Workers* v. *Mitchell*, 330 U. S. 75).

As the Supreme Court stated in *Barnette* (319 U. S. 624, 637):

> "Free public education if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction."

Since the actions of appellant were contrary to sound educational principles, and since those actions were not constitutionally protected in the circumstances of this appeal, the action of the respondent in terminating appellant's probationary appointment must be sustained.

THE APPEAL IS DISMISSED.

IN WITNESS WHEREOF, I, EWALD B. NYQUIST, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department at the City of Albany, this 23rd day of September 1970.

(SEAL.) EWALD B. NYQIST.

APPENDIX 3

June 9, 1972

Hon. Henry J. Friendly
Chief Judge
United States Court of Appeals
United States Court House
Foley Square
New York, New York 10007

Re: *James* v. *Board of Education et al*
Docket No. 72-1109
Cal. No. 697

Dear Judge Friendly:

This letter is written on behalf of the New York State Commissioner of Education who has appeared throughout as *amicus curiae* in the above entitled matter.

We urgently support the petition for a hearing *in banc* which has been or will be filed by the board of education of the Addison Central School District, Steuben County, New York, Appellees.

We strongly feel that the decision of the Court, rendered May 24, 1972, is directly contrary to sound educational principles and will have serious adverse effects on the New York State school system. It is directly contrary to the Code of Ethics adopted jointly by both the New York State School Boards Association and the New York State Teachers Association, and directly contrary to specific directives issued to all school districts by the New York State Education Department.

It is our view that this decision would open the door to political indoctrination in the State's classrooms.

Appendix 3

When the Court says:

> "There is no suggestion whatever that his [James'] armband interfered with his teaching functions . . ."

and

> "It is appropriate, however, lest our decision today (which is based on the total absence of any facts justifying the board of education's actions) be misunderstood, that we disclaim any intent to condone partisan political activities in the public schools *which reasonably may be expected to interfere with the educational process.*" (Emphasis supplied.)

it is clear that the Court misapprehended the nature of the educational process. It is exactly the act of (1) teaching only one of several views of a highly controversial subject and (2) teaching in a field in which he has no demonstrated competence which does, in and of itself, interfere with the educational process, which is the heart of the problem here.

We are deeply disturbed by the holding throughout the decision that only "disruption" and "incidents or threats to school discipline" can be a proper basis for action by a board of education. It is the teaching function itself with which we are concerned rather than any question of discipline or possible disruption. It is submitted that such an approach would divest boards of education of control over the very core of their functions.

We are, further, greatly disturbed over the Courts sanctioning a procedure where a State *judicial* tribunal (see New York Education Law sections 310, 207) renders a judicial decision, based on the filing and service of pleadings, memoranda of law and an oral argument (characterized inaccurately by the Court "as we were informed at the argument of this appeal" as "no more than an informal

round-table discussion between the Commissioner, the parties and their attorneys"), and the same petitioner, represented by the same counsel ignoring such procedure and decision, proceeds *de novo* in the Federal Court. It is submitted that from the standpoint of proper Federal judicial procedure and jurisdiction, such a decision may not be collaterally attacked in such fashion. Either the petitioner should seek to review the Commissioner's decision in the State Courts and then appeal from them to the United States Supreme Court; or the petitioner should seek review of the decision directly in the Federal Courts. In either case the record, on the basis of which the Commissioner's decision was rendered, would be before the Court. To sanction such an improper approach to the judicial function would have a chilling effect on any use of any State procedures, and ignores the fundamental principle of *res judicata*.

We are, finally, greatly disturbed by the repeated references by the Court to wholly nonexistent facts for which there is no basis whatever in the record. The Court says:

> "We cannot countenance school authorities arbitrarily censoring a teacher's speech *merely because they do not agree with the teacher's political philosophies or learnings*".

There is not one scintilla of evidence in the record to support such a statement. In fact, it is our understanding that both the board of education and the administration are divided on these issues, and it is for this very reason—to be sure that the students will not be proselytized one way *or the other* but will be given the whole picture, with all sides explained in the class and at the time when the subject is properly reached for discussion—that strict neutrality was and is required of teachers by the board of education.

Appendix 3

When the Court says:

> "Clearly, there was no attempt by James to proselytize his students",

we can only ask for what other reason he could possibly have worn the armband *to class*?

It can hardly be maintained that limiting an English class to the teaching of English or a mathematics class to the teaching of mathematics, imposes a "pall of orthodoxy" on the students.

Nor can such a "pall of orthodoxy" be found where a school insists that students be acquainted with all sides of a given subject, and only by the teacher charged with, prepared for, and expert in, the subject involved, whatever it may be.

"Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction". (*West Virginia* v. *Barnette*, 319 U. S. 624, 637.)

We think the Court went far afield indeed when it said:

> ". . . as far as we know [James' armband] *did not have any influence on any students* and did not engender protest from any student, teacher or parent". (Emphasis supplied.)

For one thing the record is wholly devoid of evidence on this question, and, more importantly, since students are told to look up to, emulate, and be guided by their teachers, the influence of such expressions of political views of teachers on students is almost impossible to gauge especially within the confines of a lawsuit. This is particularly true where no opportunity for discussion exists—the subject of the teacher lying in other fields.

For all the foregoing reasons, *amicus curiae* respectfully supports the motion of appellees for a rehearing *in banc*.

Respectfully,

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United States Court House
Foley Square
New York, New York 10007

JPJ:sh

APPENDIX 4

72-1109

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHARLES JAMES,
Plaintiff-Appellant,

v.

BOARD OF EDUCATION, CENTRAL DISTRICT #1 of the Towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTED; STEUBEN CITY, NEW YORK, EDWARD BROWN, District Principal, Central District #1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District #1,
Defendants-Appellees.

A petition for a rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellees, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. Judges HAY and MULLIGAN dissent. The order of July 3, 1972 is vacated.

HENRY J. FRIENDLY
Chief Judge

July 12, 1972.

Received
Jul 18 1972
Office of the
Counsel